

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:

MONTREAL MAINE & ATLANTIC
RAILWAY, LTD.

Debtor.

Bk. No. 13-10670

Chapter 11

**ESTATE REPRESENTATIVE'S OBJECTION TO ADMINISTRATIVE
CLAIM APPLICATION OF JEFFREY C. DURANT**

Robert J. Keach, the estate representative (the "Estate Representative") for the post-effective date estate of Montreal Maine & Atlantic Railway, Ltd. (the "Debtor"), hereby objects (the "Objection") to the *Administrative Claim Application of Jeffery C. Durant* [D.E. 1283] (the "Application"). In support of this Objection, the Estate Representative states as follows:

RELEVANT BACKGROUND

1. On August 7, 2013 (the "Petition Date"), the Debtor filed its chapter 11 petition.
2. On October 15, 2013, while Mr. Durant was working at the Debtor's Northern Maine Junction Yard in Hermon, Maine, Inspector Raylinsky from the Federal Railroad Administration (the "FRA") was on the Debtor's premises and observed a track that was not properly secured with handbrakes (the "Incident").
3. After a formal investigation, a hearing was held on October 29, 2013, and the hearing officer determined that Mr. Durant was indeed responsible for leaving "rail cars unattended and unsecured on Track No. 1. . . ," which placed Mr. Durant in violation of the Debtor's "Rules . . . , Job Briefing Guidelines, and General Safety Instructions" See Cote Letter (as defined below).

4. On November 12, 2013, Robert N. Cote, General Manger—Engineering, wrote to Mr. Durant to inform him that he had been assessed “Dismissal” (attached hereto as Exhibit A, the “Cote Letter”).

5. On January 6, 2014, Kevin Moore, General Chairman of the Union, sent a letter to Ms. Gaynor Ryan, Vice President of Human Resources for the Debtor (the “Dismissal Appeal Request”), appealing the dismissal of Mr. Durant, and requesting, among other things, Mr. Durant’s “[i]mmediate restoration to service, removal of “Dismissal” from his record, payment of all lost time and all other expenses as a result of the discipline and attendance of his discipline hearing” Dis. App. Ltr., 1.

6. On January 24, 2014, in accordance with the Collective Agreement (the “CBA”) between Montreal, Maine & Atlantic Railway, Ltd. and the Brotherhood of Locomotive Engineers & Trainmen (the “Union”), the Debtor held a conference in response to the Dismissal letter, and on February 10, 2014, issued a written response detailing the evidence supporting Mr. Durant’s dismissal and denying the Dismissal Appeal Request (attached hereto as Exhibit B, the “Appeal Denial Letter”).

7. Other the filing of claims in the Debtor’s chapter 11 case (as set forth below), the issuance of the Appeal Denial Letter was the last event pertaining to the Incident of which the Debtor is aware.

8. On June 13, 2014, Mr. Durant filed a proof of claim pursuant to Bankruptcy Code section 502(a) (the “Claim”). The Claim asserted a priority claim against the Debtor in the amount of \$525,644.70 in the nature of “[w]rongful [t]ermination of [e]mployment.” Mr. Durant provided no substantiation for the calculation or magnitude of the Claim.

9. On December 1, 2014, Mr. Durant filed the Application, seeking allowance of an administrative claim in the amount of \$525,644.20 (the “Asserted Admin Claim”), which Mr.

Durant asserts constitutes a proration of his \$65,000 annual salary and benefits between the date of his dismissal—November 12, 2013—and the discontinuance of operations of the railroad—May 15, 2014, plus “future pay.” *See App.*, at 2. Mr. Durant provided no substantiation for the calculation or magnitude of the Claim. Attached to the Application were, among other things, pages 1-3 and 27-32 of an unexecuted copy of the CBA.

10. The Application also provides that the Trustee assumed the CBA, but cites only to statutes that do not affect such alleged assumption, and cites no bankruptcy court order authorizing or ordering assumption. *See App.*, at 1.

11. The Trustee never assumed the CBA.

12. By agreed order, the Claim was disallowed on October 1, 2015 [D.E. 1758] (the “Claim Disallowance Order”), but Mr. Durant’s right to prosecute (and the Estate Representative’s right to oppose) the Application were preserved. The Claim Disallowance Order also provided that a hearing on the Application would be scheduled for a mutually agreeable date for Mr. Durant and the Estate Representative, or as otherwise set by the Court.

13. On April 14, 2016, counsel to the Estate Representative left Mr. Durant a voicemail and sent Mr. Durant an email, in each case notifying Mr. Durant of the upcoming dates the Court has indicated on its website are available for chapter 11 matters. As of the date hereof, counsel to the Estate Representative has not yet heard back from Mr. Durant regarding which dates might work for him for a hearing on the Application.

OBJECTION

A. Mr. Durant Has Failed to Meet His Burden in Demonstrating Entitlement to an Administrative Claim

14. As an initial matter, Mr. Durant has failed to carry his burden in demonstrating entitlement to administrative status, and the Application must thus be denied. “An administrative expense claimant bears the burden of establishing that its claim qualifies for

priority status.” In re PMC Mktg. Corp., 517 B.R. 386, 391 (B.A.P. 1st Cir. 2014) (internal citations omitted). And to qualify for administrative expense status, a claim must be for an “actual, necessary cost[] [or] expense[] of preserving the estate.” 11 U.S.C. § 503(b). Putting aside the issue of whether Mr. Durant is entitled to *any* claim at all under applicable (as set forth below, he is not), the fact that Mr. Durant’s dismissal occurred after the Petition Date, in and of itself, is insufficient to establish an entitlement to administrative expense status.¹ He must establish that his claim constituted an “actual, necessary cost[] [or] expense[] of preserving the estate.” 11 U.S.C. § 503(b). But Mr. Durant has made no such assertion (let alone demonstrated sufficient evidence to sustain his burden of proof), and the Application must thus be denied. *See PMC Mktg.*, 517 B.R. at 391.

B. Mr. Durant Has No Right to Payment Under Applicable Law

15. Moreover, regardless of Mr. Durant’s failure to satisfy his burden in meriting administrative expense status, he has no right to payment under applicable law, and thus the Application must be denied. Mr. Durant asserts that the nature of his Claims is for “wrongful[] terminat[ion],” and yet the State of Maine does not recognize such a cause of action. *See Lyons v. Louisiana Pac. Corp.*, No. CIV. 02-29-B-K, 2002 WL 519745, at *3 (D. Me. Apr. 5, 2002)

¹ Mr. Durant asserts that the Trustee assumed the CBA, but that is not true. The CBA was never assumed, and thus was rejected by operation of the *Trustee’s Revised First Amended Plan of Liquidation, Dated as of July 15, 2015 (as Amended on October 8, 2015)* [D.E. 1822] (the “Plan”):

Pursuant to sections 365(a) and 1123(b)(2) of the Bankruptcy Code, all executory contracts and unexpired leases that exist between the Debtor and any Person . . . shall be deemed rejected by the Debtor as of immediately prior to the Effective Date, except for any executory contract or unexpired lease (i) that has been assumed and assigned or rejected pursuant to an order of the Bankruptcy Court entered prior to the Effective Date, (ii) as to which a motion for approval of the assumption or assignment of such executory contract or unexpired lease has been filed and served prior to the Confirmation Date, or (iii) is otherwise provided for under Sections 8.2 or 8.3 of the Plan.

See Plan, Art. 8.1(a); Order Confirming Trustee’s Revised First Amended Plan of Liquidation, Dated as of July 15, 2015 (as Amended on October 8, 2015) [D.E. 1822], at ¶ 81 (same). But whether the Trustee assumed the CBA is irrelevant to the administrative status of the Asserted Admin Claim because, as set forth below, no claim exists under the CBA or applicable law.

(dismissing claim for wrongful termination on the ground that claimant “ha[d] no possibility of recovery under any facts he might be able to establish” given that “Maine law does not recognize a common law claim for wrongful termination”) (citing Maine Bonding & Cas. Co. v. Douglas Dynamics, Inc., 594 A.2d 1079, 1080 (Me. 1991) (acknowledging that Maine does not recognize a tort of wrongful discharge); Bard v. Bath Iron Works Corp., 590 A.2d 152, 156 (Me. 1991) (stating that the Maine Supreme Court has not recognized a common law cause of action for wrongful discharge). Rather, in Maine, “an employer has a common law right to discharge an employee at will, absent a contract for employment restricting this right or a clearly expressed intention by the employer that it would only discharge the employee for cause.” Lyons, 2002 WL 519745, at *3 (citing Bard, 590 A.2d at 155).

16. Mr. Durant alleges that he is covered by the CBA. *See* App., at 1. But Mr. Durant does not allege what provision of the CBA might give rise to his Asserted Admin Claim (indeed, Mr. Durant has included only an excerpt of an unexecuted draft of the CBA with his Application), and no such provision appears to exist. In any event, to the extent that the CBA restricted the Debtor’s common law right to discharge Mr. Durant at will, the Debtor *did* have cause to discharge Mr. Durant, as set forth in the Cote Letter. Specifically, Mr. Durant was found, after a “formal [i]nvestigation hearing,” to have “left rail cars unattended and unsecured on Track No. 1 of the Northern Maine Junction Yard in Hermon, ME[,]” which “[p]laced [Mr. Durant] in violation of [the Debtor’s] Rules . . . , Job Briefing Guidelines, and General Safety Instructions” *See Exhibit A*, Cote Letter, ¶2. Accordingly, the Debtor was well within its rights to discharge Mr. Durant, regardless of whether it could only do so for cause. Moreover, as demonstrated in and by the Dismissal Denial Letter, Mr. Durant received all the process to which he was entitled in appealing his dismissal. *See generally Exhibit B*, Dismissal Denial Letter. Given that Mr. Durant exhausted his rights under the CBA, which exhaustion

culminated in a denial of the appeal of his dismissal, he is entitled to no compensation under the CBA or other applicable law.

17. As Mr. Durant was discharged for cause after a formal investigation and hearing in which he was determined to have violated several safety regulations and guidelines, and because he exhausted his remedies under the CBA and applicable law without altering his dismissal for cause, he has no right to payment from the Debtor under applicable law. Accordingly, the Application should thus be denied in its entirety.²

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Estate Representative requests that the Court (i) deny the Application and, only if the Court deems necessary, set a hearing on the Application, and (ii) grant such other and further relief as may be just.

Dated: April 20, 2016

**ROBERT J. KEACH, ESTATE
REPRESENTATIVE OF THE POST-
EFFECTIVE DATE ESTATE OF MONTREAL
MAINE & ATLANTIC RAILWAY, LTD.**

By his attorneys:

/s/ Sam Anderson
Sam Anderson, Esq.
Lindsay K. Zahradka, Esq. (admitted *pro hac vice*)
BERNSTEIN, SHUR, SAWYER & NELSON, P.A.
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² Finally, the Estate Representative also objects to the Application on the grounds that Mr. Durant has failed to include sufficient documentation to justify the amount asserted. The Estate Representative reserves the right to more fully contest the validity of the amount asserted should this Objection not be sustained.



Montreal, Maine & Atlantic Railway, Ltd.

15 Iron Road
Hermon, ME 04401

November 12, 2013

Certified Mail: 7008 1830 0001 2462 1496

Mr. Jeffery Durant
1029 Main Road
Brownville, ME 04414

Mr. Durant:

Refer to the formal investigation hearing that was held at 9:00 a.m., Tuesday, October 29, 2013, at the Montreal, Maine and Atlantic Railway's main office, Northern Maine Junction, Hermon, ME, for the purpose of ascertaining the facts and determine your responsibility, if any, in connection with the report that in the early afternoon hours on October 15, 2013, you left rail cars unattended and unsecured in Track No. 1 of the Northern Maine Jct. Yard, Hermon, ME, while performing service as crew members of Assignment 210.

The facts presented during the formal investigation revealed that on October 15, 2013, you left rail cars unattended and unsecured on Track No. 1 of the Northern Maine Junction Yard in Hermon, ME. This placed you in violation of the Carrier's Safety Rules 9000, 9001, 9002, Job Briefing Guidelines, and General Safety Instructions 112-1 and 112-2.

For these violations, you are assessed discipline in the form of dismissal. You are dismissed from the service of the Montreal, Maine & Atlantic Railway effective immediately. You are instructed to contact Manager Train Operations Chris Carr at (207)478-9854 no later than the close of business on Friday, November 22, 2012, and make arrangements to return all Company property in your possession.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Cote". The signature is fluid and cursive.

Robert N. Cote
GM Engineering

Cc: G. Ryan, VP Human Resources
K. Strout, Director Operating Practices
C. Carr, Manager Transportation Operations
K. Moore, BLET General Chairman
M. Lafrenier, BLET Vice President



MONTREAL, MAINE & ATLANTIC RAILWAY

NORTHERN MAINE JUNCTION PARK

15 IRON ROAD HERMON, MAINE 04401-9621

February 10, 2014

Kevin J. Moore, General Chairman -BLET
3 Deer Hollow Road
Plaistow, NH 03865

CERTIFIED MAIL: 7008 1830 0001 2462 1519

Dear Mr. Moore:

This is in reference to your letter of appeal, file BLET Case No. GCDE-13-9-MMA Durant, dated January 6, 2014, and will serve to confirm the conference held in connection therewith on January 24, 2014, in the matter of:

Appeal of Discipline is presented on behalf of Engineer J. Durant, for removal of "Dismissal" from the Discipline Record Book against his name, as assessed in Carrier letter to him dated November 12, 2013 over the signature of Robert N. Cote General Manager-Engineering

Appeal of Discipline is presented pursuant to Article 26 of the MMA/BLET Agreements in effect and the Railway Labor Act, as amended. Immediate restoration to service, removal of "Dismissal" from his record, payment of all lost time and all other expenses as a result of the discipline and attendance of his discipline hearing is requested.

Mr. Durant was regularly assigned to Assignment 210 headquartered in Northern Maine Junction. During the early afternoon hours on October 15, 2013, a FRA Inspector performed an audit in the Northern Maine Junction Yard. The Inspector notified the Carrier that he found cars located in Track No. 1 of the NMJ Yard that were unattended and unsecured. Mr. Durant and his crew were the only crew working in the yard that day. It was obvious that a hearing would be necessary to gather all of the facts surrounding this incident.

A formal hearing was ordered in line with the labor Agreements to ascertain the facts and determine responsibility, if any, *"in connection with the report that in the early afternoon hours on October 15, 2013, you left rail cars unattended and unsecured in Track No. 1 of the Northern Maine Jct. Yard, Hermon, ME, while performing service as crew members of Assignment 210."* The formal hearing was originally scheduled for October 29, 2013, at which time it was held.

There was sufficient evidence presented in the hearing – including Mr. Durant's own testimony – and recorded in the transcript to conclude that on October 15, 2013, he left rail cars unattended and unsecured in Track No. 1 of the Northern Maine Junction Yard in Hermon, ME, thus, violating the Carrier's Rules 9000, 9001, 9002, Job Briefing Guidelines, and General Safety Instructions 112-1 and 112-2. For these violations, Mr. Durant was disciplined in the form of dismissal.

Carrier witness Timothy Scalia, General Manager Mechanical, testified that he was contacted by the FRA Inspector Matt Raylinsky and requested to come to the Northern Maine Junction (NMJ) Yard. He testified that Mr. Raylinsky notified him (Scalia) that rail cars were located in Track No. 1 unattended and unsecured. See page 10 of the transcript where Mr. Scalia testified:

"Q How did you become aware of this incident?"

"A I received a phone call from the FRA inspector, Matt Raylinsky."

"Q Mr. Raylinsky that -- is FRA inspector?"

"A That is correct."

"Q Okay. Where were you located when -- you said you received a phone call?"

"A Mm-hmm."

"Q Where were you located when you received the phone call from the -- Mr. Raylinski?"

"A I was in my office here at Hermon spaces."

"Q Did you proceed to the -- well, let me back up. What did the FRA inspector inform you when he called you?"

"A He informed me that he had found some defects on some locomotives and that he also found a string of cars that didn't have any brakes and he wanted me to come down there to witness that and also bring Kenny Strout."

"Q Okay. Did -- when you say down there --"

"A Down to Hermon, track one, where the cars were at."

"Q Okay. And is that Northern Maine Junction?"

"A Yes."

Mr. Scalia further testified that when he arrived at NMJ that he inspected the rail cars in Track No. 1 and found no hand brakes applied. See page 12 of the transcript wherein Mr. Scalia testified:

"Q So immediately after the FRA inspector contacted you by phone, you did go to the Northern Maine Junction yard?"

"A Yes."

"Q And, then, you said you and the FRA inspector inspected the cars in question?"

"A Yes.

"Q *Did you personally inspect each and every car in the track to see if a hand brake was applied?*

"A *I didn't -- well, I visually saw that none of the hand brakes were applied."*

Mr. Scalia testified that when he left the office he asked Ken Strout Director of Operating Practices to accompany him to the NMJ Yard. See page 11 of the transcript wherein Mr. Scalia testified:

"A *I took -- okay. After he had called me, told me to come down there and bring Kenny Strout; so I came in here, I grabbed Mr. Strout, and we drove to the Hermon yard."*

Mr. Strout testified that he personally questioned both Mr. Currie and Mr. Durant as to whether or not they secured the rail cars in Track No. 1. Neither Mr. Currie nor Mr. Durant would state to Mr. Strout that they were absolutely positive that hand brakes had been applied to Track No. 1. See pages 54 and 55 of the transcript wherein Mr. Strout testified:

"Q *Did you ask Mr. Currie if he had applied any hand brakes on those nine cars in question?*

"A *Yes, I did. Mr. Currie was not the person chosen during the job briefing to apply the hand brakes. I guess the crew had decided that Mr. Durant was going to do it. Mr. Currie told me he did not see Mr. Durant put brakes on, but he was very sure that Mr. Durant had done that even though he didn't actually physically see him do it.*

"Q *Did Mr. Currie say anything to you about whether or not they have performed efficiency tests to see if the applied brakes would hold the cars?*

"A No".

* * * * *

"Q *Now, Mr. Durant, did you interview Mr. Durant in connection with the hand brake issue?*

"A Yes.

"Q *And what was that conversation?*

"A *Mr. Durant was very sure that he had put brakes on it, but, you know, he made the comment -- maybe not the exact words, but apparently I didn't.*

I asked him, Mr. Durant, can you positively tell me that you put a brake on those cars. And, I said, don't lie to me. Be completely honest. Can you positively say that you did put a brake on those cars when you left them. And he hesitated a

minute and, you know, being honest, he says, I can't positively say I did put a brake on it, but I -- I believe I did."

Mr. Durant testified that he and his crew had left the rail cars in Track No. 1 while they left the yard to go to Dead River's facility, some four miles away, to spot propane. See pages 39 and 40 of the transcript wherein Mr. Durant testified:

"Q So by being on the ground remote control, that placed you to assist in some of the switchings --

"A Correct.

"Q -- the switching duties? Did you eventually depart Northern Maine Junction yard that day?

"A I guess it can -- what do you consider depart, because the Dead River that we went and switched is in -- within the cautionary limits within the RPZ zone.

"Q Okay. From the -- the crux of the issue today is nine cars in track number one. Did -- how far away from those nine cars were you when you left the immediate switching area?

"A From that there I would say it was, I don't know, I think it's -- Coldbrook Road, I think, is mile 29 and I think Dead River is, like, 26 1/2, I think.

"Q So you were basically -- you were out of site of the nine cars at some point?

"A Yes."

Mr. Durant and his crew were the only crew working in NMJ on the date in question. They departed the NMJ Yard and left the rail cars in Track No. 1 unattended and unsecured. Mr. Durant's failure to ascertain that the rail cars in Track No. 1 were secured or to secure them himself placed him in violation of the Carrier's General Safety Instructions 112-1. GSI 112-1 reads:

Crew members are responsible for securing standing equipment with hand brakes to prevent undesired movement.

Mr. Durant leaving the rail cars in Track No. 1 of NMJ without at least one hand brake applied placed him in violation of the Carriers General Safety Instructions 112-2. GSI 112-2 reads:

Note: Unless otherwise specified, the following instructions do not apply on Main Track or Sidings. Unattended equipment left at locations not specified in this section must be left with the minimum number of hand brakes as required in 112-1 above.

State of Maine
1 brake 1 to 10 cars
2 brakes 11 or more cars

In view of the fact the rail cars in Track No. 1 of NMJ were inspected and found to have not even one hand brake applied and in view of the fact that neither Mr. Durant nor Mr. Currie could positively state that they applied a hand brake to the cars, Mr. Durant was in violation of the Carrier's Job Briefing Guidelines. These guidelines read in pertinent part:

Job Briefing Guidelines:

Safety, quality, and productivity are the result of well-planned and conducted job briefings.

Conduct a job briefing:

All crew members must know the following are done:

5. Cars secured before coupling and uncoupling.

Mr. Durant leaving the rail cars in Track No. 1 unattended and unsecured was nothing short of negligence and willful disregard. This placed Mr. Durant in violation of the Carrier's Rule 9002. Rule 9002 reads:

d) Any act of . . . negligence or willful disregard is cause for dismissal. Also, disregard or negligence toward the Company's interests will not be condoned and is sufficient cause for dismissal.

Mr. Durant not ascertaining that the cars left unattended in Track No. 1 were properly secured was not taking the safe course. This placed Mr. Durant in violation of the Carrier's Rule 9001. This Rule reads:

9001: a) *Employees whose duties are prescribed by these rules must have a copy available for reference while on duty, and must comply with them.*

c) *Employees must be familiar with and obey all rules and instructions . . .*

e) *In case of doubt or uncertainty the safe course must be taken.*

f) *If in doubt as to the meaning of any rule or instruction, employees must apply to their supervisor for an explanation.*

Mr. Durant's violations of the above identified Rules placed him in violation of the Carrier's Rule 9000. Rule 9000 reads:

Safety is of the first importance in the discharge of duty. Obedience to the rules is essential to safety and to remain in service.

For the violations of the above quoted Rules, Mr. Durant was disciplined in the form of dismissal.

The letter of appeal contained several contentions and allegations that must be addressed. The Organization complains, *"The Carrier introduced a document that it alleges is a report from Federal Railroad Administration inspector M. Raylinsky. The Carrier did not make Mr. Raylinsky available for questioning. How could the claimant receive a fair and impartial hearing when this is the only evidence introduced by the Carrier to prove guilt."* First and foremost, as the Organization fully knows, FRA Inspectors will not attend and testify in a formal investigation required under the collective bargaining Agreement. Secondly, the FRA citation was not the only evidence introduced by the Carrier to prove Mr. Durant violated the Carrier's Rules for which he was disciplined.

Mr. Scalia testified that he personally inspected the brake on each car and not one hand brake was applied. Moreover, Mr. Strout testified that he interviewed the crew and personally asked Mr. Durant if he could state without doubt that the rail cars were secured. Mr. Durant told Mr. Strout that he could not positively state that he had applied any hand brakes to the rail cars in question. Moreover, Mr. Currie stated that he did not observe Mr. Durant apply any hand brakes on the rail cars in question. The fact the cars were found unattended with no hand brakes applied and neither Mr. Durant nor Mr. Currie could positively state to Mr. Strout that they had applied hand brakes, it is obvious that Mr. Durant violated the rules for which he was disciplined.

The Organization states, *"The Organization also called into question the Inspectors (sic) report and the fact the Carriers (sic) Director of Operating Practices told the crew that he questioned the validity of the Inspection report."* The Organization should review the transcript more closely.

Mr. Strout told both Mr. Durant and Mr. Currie that if either of them could one-hundred percent positively tell him (Strout) that without question they applied a hand brake then he would question the Inspection report. Neither Mr. Durant nor Mr. Currie would state to Mr. Strout that he was positive that a hand brake had been applied to the rail cars in question. Based on that information, Mr. Strout did not question Mr. Raylinsky's findings or report.

The Organization complains, *"The Carrier chose not to do a download of the claimant's engine which would have shown if a hand brake securement test had been performed. Failing to check the locomotive was another instant of the Carrier failing their burden of proof in this case."* No download was necessary as a FRA Inspector and the Carrier's Mechanical Manager both personally inspected the rail cars in question and found no hand brake applied. Mr. Strout questioned both Mr. Durant and Mr. Currie. Mr. Durant could not positively state to Mr. Strout that he applied a hand brake on the rail cars in question. Mr. Currie stated that he did not apply a hand brake and did not witness Mr. Durant applying any hand brakes. With no hand brake(s) applied, there would not have been a brake securement test.

Moreover, under the testing provisions set forth in GSI 112-1, the event recorder data could not be used to determine if the crew performed a securement test as the event recorder does not record the adjustment of slack.

The Organization further complains, *"the Hearing officer entering Carrier rules to the hearing. The hearing officer is supposed to conduct the hearing in a fair and impartial manner."* The hearing officer's questioning of Mr. Durant as to whether or not he was familiar with and understood certain rules had no negative effect on him receiving a fair and impartial hearing.

The Organization further contends, *"The burden of proof is on the Carrier to provide evidence and testimony to prove the claimant's guilt."* There was more than ample evidence presented during the formal investigation and recorded in the transcript to conclude that Mr. Durant violated the rules for which he was disciplined. First, Mr. Scalia testified that he personally verified that no hand brakes were applied to the rail cars in Track No. 1. Secondly, Mr. Strout testified that he personally questioned Mr. Durant and Mr. Durant would not state that he was positive that he had applied any hand brake(s). Third, the Carrier received a citation from the FRA for the cars left unattended and unsecured in Track No. 1 on October 15, 2013. How much evidence does the Organization need to accept the fact the cars were not secured?

The Organization argues, *"the carriers (sic) charging officer or witness should have introduced these rules and explained how the claimant's actions or inaction violated the rules."* Any Carrier Officer testifying in the investigation as to how Mr. Durant violated a rule would have been prejudgment. If any Carrier officer had testified to such, the Organization would have screamed to high heaven that Mr. Durant had been prejudged as no such determination can be made until all of the facts have been ascertained and no one has access to all of the facts until the formal investigation is concluded and the transcript has been produced.

The Organization opines, *"Mr. Hicks stated he was there to get the facts, but it is the Carrier's burden to provide the facts."* The Organization is mistaken in its position that the Carrier is to provide the facts. The purpose of the formal investigation is to ascertain the facts. Facts come from witness as well as the charged employees. It is the Carrier's responsibility to review all of the facts after they have been gathered in the formal investigation and recorded in the transcript to then determine if a rule has been violated.

A review of Mr. Durant's record revealed the following:

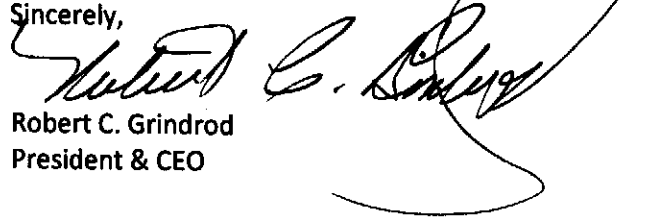
01/09/03	Employed	
11/17/06	Suspended 11 days	Violated Rules 9000, 9002, 9004, 9010
01/08/07	Suspended 5 days	Violated Rule CROR 112
09/02/11	Suspended 3 days	Violated Rules OB-2-149 (j), CROR 115
12/13/12	Written Reprimand	Violated Rules 9000, 9150, 9157, CROR 104 (h) (q)
11/12/13	Dismissed	Violation Rules 9000, 9001, 9002 JB, Guidelines, GSI 112-1, 112-2 (This event)

While Mr. Durant had almost eleven years of service with the Carrier, it appears his work habits never reached the level of an experienced employee. Moreover, this was his second incident involving leaving rail cars unattended and unsecured as he had been previously disciplined for another such incident that occurred on January 8, 2007.

Mr. Durant was a member of Assignment 210 on the date in question. He and Mr. Currie departed NMJ Yard leaving rail cars in Track No. 1 unattended and unsecured. In view of the recent incident on the Carrier's property, one would think this would have been the last thing any MMA employee would have done. Leaving the rail cars unsecured while unattended was a serious infraction of the Carrier's Rules. He was disciplined accordingly. Such discipline was not arbitrary and capricious as alleged, but warranted.

In view of all the above, the appeal is denied.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert C. Grindrod". The signature is written in a cursive style with a large, looping flourish at the end.

Robert C. Grindrod
President & CEO